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**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

B5

[redacted]

DATE: NOV 21 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an exporter of oilfield and mining equipment. It seeks to employ the beneficiary permanently in the United States as a sales engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements or qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess the requisite education for the position.

On appeal, counsel submits a brief, an educational evaluation, information regarding the beneficiary's prior employment, and additional evidence. The AAO will sustain the appeal and find that the beneficiary possesses the requisite education for the position.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a foreign five-year combined bachelor's degree and master's degree in electronics engineering with a specialization in radio communications, broadcasting, and television in 1978 at the Electrotechnical Institute of Communications in 1978 in the former Soviet Union. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

**Eligibility for the Classification Sought**

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries Congress assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. Rather, U.S. Citizenship and Immigration Services (USCIS) determines whether the alien is qualified under the alien employment certification requirements. *Matter of Wing's Tea House*, 16 I&N Dec. 160 (Acting Reg'l Comm'r

1977). Federal courts have recognized this division of authority. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 appeared in the Federal Register, the Immigration and Naturalization Service (the Service) (now USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a U.S. baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

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[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

The petitioner submitted an evaluation from [redacted] of Education International dated January 12, 2001. [redacted] concludes that the beneficiary completed the equivalent to a master's degree in electronics engineering in the United States. On October 14, 2008, [redacted] clarified that the beneficiary's institute only awarded five-year combined bachelor's degrees and master's degrees rather than separate degrees in 1978 under the former Soviet Union's educational system. On January 14, 2009, [redacted] wrote another letter addressed to USCIS, stating that the beneficiary's five-year combined bachelor's degree and master's degree program is the equivalent to a U.S. master's degree. [redacted] notes that many U.S. universities such as Columbia University, Duke University, Carnegie Mellon University, the University of Michigan, the University of Washington, Rutgers University, and the University of Connecticut offer this type of combined degree program. [redacted] relies on the [redacted] to support his assertions.

The petitioner also submitted evaluations from [redacted] of the [redacted] c. dated December 18, 2008 and from [redacted] of Seattle Pacific University dated December 17, 2008. [redacted] concludes that the beneficiary possesses the equivalent to a bachelor's degree and a master's degree in electrical engineering with a specialization in communications in the United States. [redacted] concludes that the beneficiary possesses the equivalent to a five-year integrated Bachelor of Science and Master of Science in electrical engineering with a specialization in communications in the United States. [redacted] states that he is a member of the American Association of Collegiate Registrars and Admissions Officers [redacted]

Due to [redacted] reliance on [redacted] and the membership of [redacted] in [redacted], the AAO has consulted [redacted] as a tool to help analyze the beneficiary's educational background. According to its website, [redacted] which created [redacted] is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* [redacted] (accessed November 14, 2011 and incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 ([redacted] March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by [redacted] to support its decision.

According to the login page, [redacted] is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of [redacted], Director of [redacted] (accessed November 14, 2011 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 [redacted] August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from [redacted] to conclude that the alien's three-year foreign "baccalaureate" and

foreign "Master's" degree were comparable to a U.S. bachelor's degree. In [redacted], 2010 WL 3325442 ([redacted]. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in [redacted] and did not abuse its discretion in reaching its conclusion. The court also noted that the alien employment certification itself required a degree and did not allow for the combination of education and experience.

In the section related to the Russian educational system, [redacted] further provides that the five-year diplom spetsialista represents attainment of a level of education comparable to a master's degree in the United States. This information is consistent with the credentials evaluations that counsel has submitted.

Counsel has submitted information regarding approximately 50 academic programs in the United States that offer combined bachelor's degree and master's degree programs. Counsel has also submitted information regarding master's degree programs in the United States requiring only a condensed period of study.

Because the beneficiary has a U.S. advanced degree or foreign equivalent degree, he qualifies for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

**Qualifications for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309. *See also Matter of Wing's Tea House*, 16 I&N Dec. at 160.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, line 4, of the alien employment certification reflects that a master's degree in engineering is the minimum level of education required. Line 6 reflects that two years of experience in the proffered position are required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary earned a foreign five-year combined bachelor's degree and master's degree in electronics engineering with a specialization in radio communications, broadcasting, and television in 1978 at the Electrotechnical Institute of Communications in 1978 in the former Soviet Union. The petitioner has also demonstrated that the beneficiary possessed more than two years of qualifying experience for the position before the priority date.

The beneficiary does have a U.S. master's degree or a foreign equivalent degree. Thus, the beneficiary does qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does meet the job requirements on the alien employment certification. For these reasons, the petition may be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER**: The appeal is sustained.